

No. A09-364

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy  
for Approval of a Mercury Emissions Reduction Plan for the Sherburne County  
Generating Facility's Unit 3

Southern Minnesota Municipal Power Agency,  
Relator-Appellant,

vs.

Minnesota Public Utilities Commission,  
Respondent-Appellee,

Northern States Power Company,  
Utility-Respondent.

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**BRIEF AND APPENDIX OF RESPONDENT  
MINNESOTA PUBLIC UTILITIES COMMISSION**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
LEGAL ISSUES .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS.....	3
I. MERCURY EMISSIONS ARE HAZARDOUS TO HUMAN HEALTH AND THE ENVIRONMENT.....	3
II. THE ACT REQUIRES RAPID AND SUBSTANTIAL REDUCTIONS IN MERCURY EMISSIONS FROM THE LARGEST COAL-FIRED EMITTERS, INCLUDING SHERCO 3.....	4
III. THE MERCURY EMISSIONS REDUCTION PLAN FOR SHERCO 3 WAS FILED WITH THE COMMISSION AND MPCA FOR REVIEW.....	6
IV. THE MPCA REVIEWED THE PLAN AND RECOMMENDED APPROVAL.....	6
V. CONSISTENT WITH THE ACT, THE COMMISSION REVIEWED AND APPROVED THE MERCURY REDUCTION PLAN FOR SHERCO 3. ....	7
SCOPE OF REVIEW.....	10
SUMMARY OF THE ARGUMENT.....	12
ARGUMENT.....	13
I. THE COMMISSION HAS THE STATUTORY AUTHORITY TO APPROVE THE MERCURY REDUCTION PLAN FOR SHERCO 3, SUBMITTED BY XCEL.....	13
A. The Plain Language Of The Act Authorizes The Commission To Approve A Mercury Reduction Plan For The Sherco 3 Unit .....	13
B. The Legislature Need Not Include The Term “Municipal Utility” In The Act To Give The Commission Authority To Approve A Mercury Emissions Reduction Plan For Sherco 3 As A Whole. ....	18

C. The Legislative History Confirms That The Commission Has The Authority To Approve A Mercury Emissions Reduction Plan For Sherco 3 As A Whole..... 21

D. The Commission Acted Well Within Its Statutory Authority When It Approved The Mercury Reduction Plan For Sherco 3. .... 25

II. THE COMMISSION’S DECISION TO APPROVE THE MERCURY REDUCTION PLAN FOR SHERCO 3 IS WELL-REASONED, NOT ARBITRARY AND CAPRICIOUS..... 26

CONCLUSION ..... 32

APPENDIX

## TABLE OF AUTHORITIES

	Page
<b>MINNESOTA STATUTES</b>	
Minn. Stat. § 14.69 (2008) .....	10
Minn. Stat. § 216B.01 (2008).....	12, 18
Minn. Stat. § 216B.045 (2004).....	19, 20
Minn. Stat. § 216B.1691 (2008).....	5
Minn. Stat. § 216B.243 (2008).....	5
Minn. Stat. § 216B.2425 (2008).....	5
Minn. Stat. § 216B.68 (2008).....	1, 12, 15
Minn. Stat. § 216B.682 (2008).....	passim
Minn. Stat. § 216B.683 (2008).....	30
Minn. Stat. § 216B.684 (2008).....	6
Minn. Stat. § 216B.685 (2008).....	passim
Minn. Stat. § 216E.03 (2008).....	5
Minn. Stat. § 645.16 (2008) .....	13, 16, 20, 21
<b>MINNESOTA CASES</b>	
<i>Am. Family Ins. Group v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000).....	13, 24, 25, 26
<i>Baker v. Ploetz</i> , 616 N.W.2d 263 (Minn. 2000).....	21, 25
<i>Frieler v. Carlson Marketing Group</i> , 751 N.W.2d 558 (Minn. 2008).....	11
<i>Geo. A. Hormel &amp; Co. v. Asper</i> , 428 N.W.2d 47 (Minn. 1988).....	11, 28

<i>ILHC v. Eagan, LLC,</i> 693 N.W.2d 412 (Minn. 2005).....	passim
<i>In re Application Grand Rapids Pub. Utilities Comm'n To Extend Its Assigned Service Area,</i> 731 N.W.2d 866 (Minn. Ct. App. 2007).....	10
<i>In re Denial of Eller Media Co.'s Application for Outdoor Adver. Device Permits,</i> 664 N.W.2d 1 (Minn. 2003).....	11
<i>In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota,</i> 624 N.W.2d 264 (Minn. 2001).....	11
<i>In re Petition of Minnesota Power for Authority to Change its Schedule of Rates for Retail Electric Service,</i> 545 N.W.2d 49 (Minn. Ct. App. 1996).....	1, 11, 25, 31
<i>In the Matter of an Investigation into the Commission's Jurisdiction over the City of Hutchinson's Interstate Natural Gas Pipeline,</i> 707 N.W.2d 223 (Minn. Ct. App. 2005).....	19, 20
<i>In the Matter of Quantification of Environmental Costs,</i> 578 N.W.2d 794 (Minn. Ct. App. 1998).....	1, 29, 31
<i>Markwardt v. State, Water Resources Bd.,</i> 254 N.W.2d 371 (Minn. 1977).....	10
<i>Reiter v. Kiffmeyer,</i> 721 N.W.2d 908 (Minn. 2006).....	1, 17, 28
<i>Reserve Mining Co. v. Herbst,</i> 256 N.W.2d 808 (Minn. 1977).....	29, 31
<i>Trout Unlimited, Inc. v. Minnesota Dep't of Agric.,</i> 528 N.W.2d 903 (Minn. Ct. App. 1995).....	10
<i>Vicker v. Starkey,</i> 265 Minn. 464, 122 N.W.2d 169 (1963).....	11

**OTHER AUTHORITIES**

*http://www.merriam-webster.com/dictionary/unit*..... 15

Order, MPUC Docket No. E-002/M-02-633 (Feb. 15, 2008)..... 8-9

Xcel Energy Errata, 2009 MERP Revenue Requirements and Tracker Report, MPUC  
Docket No. E-002/M-02-633 (filed October 17, 2008) ..... 9

## LEGAL ISSUES

- I. The Mercury Emissions Reduction Act of 2006, Minn. Stat. §§ 216B.68-688, specifically requires the Minnesota Public Utilities Commission to review mercury emissions reduction plans for coal-fired electric units filed with the Commission and authorizes the Commission to either approve the plan or require the submittal of a new or amended plan. Does the Commission have the statutory authority to approve the mercury emissions reduction plan for the Sherco 3 unit, submitted by Xcel Energy?

*The Commission ruled in the affirmative.*

### **Apposite Authority:**

Minn. Stat. § 216B.685

Minn. Stat. § 216B.682

*In re Petition of Minnesota Power for Authority to Change its Schedule of Rates for Retail Electric Service*, 545 N.W.2d 49 (Minn. Ct. App. 1996)

*ILHC v. Eagan, LLC*, 693 N.W.2d 412 (Minn. 2005)

*Reiter v. Kiffmeyer*, 721 N.W.2d 908 (Minn. 2006)

- II. Based on the record, the Commission found that the mercury reduction plan for the Sherco 3 unit meets the requirements of the statute, promises significant environmental and health benefits, is technically feasible, is cost-effective and will not impose excessive costs on Xcel's customers. Is the Commission's decision to approve the plan well-reasoned rather than arbitrary and capricious?

*The Commission ruled in the affirmative.*

### **Apposite Authority:**

Minn. Stat. § 216B.685

*In re Petition of Minnesota Power for Authority to Change its Schedule of Rates for Retail Electric Service*, 545 N.W.2d 49 (Minn. Ct. App. 1996)

*In the Matter of Quantification of Environmental Costs*, 578 N.W.2d 794 (Minn. Ct. App. 1998)

## STATEMENT OF THE CASE

In 2006, the Legislature passed the Mercury Emissions Reduction Act (“Act”). Minn. Stat. §§ 216B.68-688 (2008). The Act seeks to rapidly reduce hazardous mercury emissions from targeted coal-fired power units in Minnesota, including the Sherburne County Generating Facility Unit 3 (“Sherco 3”). The Act requires public utilities owning targeted units to submit to the Minnesota Public Utilities Commission (“Commission” or “MPUC”) and the Minnesota Pollution Control Agency (“MPCA”) a mercury reduction plan for each such unit. Minn. Stat. § 216B.682. The plan “must propose” to use the technology “that is most likely to result in the removal of at least 90 percent of mercury emitted *from the unit.*” *Id.* (emphasis added). Further, the Act authorizes and requires the Commission to review and approve such plans for targeted units under a very abbreviated time frame. Minn. Stat. § 216B.685.

Consistent with the requirements of the Act, on December 21, 2007, Northern States Power Company d/b/a Xcel Energy (“Xcel”) filed a mercury emissions reduction plan for Sherco 3. Xcel owns the Sherco 3 unit with the Southern Minnesota Municipal Power Agency (“SMMPA”), and operates the facility. On June 18, 2008, the MPCA filed its report with the Commission recommending approval of Xcel’s mercury reduction plan for the Sherco 3 unit.

After taking written and oral comments from parties and interested persons including SMMPA, the Commission approved the plan for Sherco 3 by its *Order Approving Mercury Emissions Reduction Plan, Requiring Implementation, Requiring Optimization of Equipment, and Requiring Annual Reporting* (“Order”), dated

November 6, 2008. In its *Order*, the Commission determined that the Act applies to Sherco 3 and that the proposed plan meets the requirements of the Act. SMMPA's Addendum ("ADD.") 4-5. On November 25, 2008, SMMPA filed a request for reconsideration, which was denied by the Commission's January 28, 2009 *Order Denying Reconsideration*.

The Commission acted well within its statutory authority when it approved the emissions reduction plan for the Sherco 3 unit. Further, the *Order* reflects the Commission's reasoned decision-making.

#### **STATEMENT OF THE FACTS**

##### **I. MERCURY EMISSIONS ARE HAZARDOUS TO HUMAN HEALTH AND THE ENVIRONMENT.**

Mercury emissions pose serious risks to human health and the environment. Scientific studies show mercury is a potent neurotoxin, which can cause damage to nerve tissue. SMMPA's Appendix ("A") A70. Mercury exposure also has been associated with declines in children's IQ scores. A70. Mercury is especially dangerous because it can be transferred from pregnant women to their developing fetuses. A70. *See also* Appendix of Respondent Minnesota Public Utilities Commission ("PUC A") at 13 (Senate Floor statement of Sen. Dibble, Senate author of the Act, explaining mercury "affects our liver and kidney function, . . . it affects our nervous system, . . . and our brain function. It's particularly insidious in it's effects on . . . young children and fetuses that are developing inside their moms, . . .").

According to the MPCA, “[m]ercury emissions contribute to fish consumption advisories and water quality impairment via atmospheric deposition on lakes, rivers and contributing watersheds. The MPCA’s 2004 impaired waters list identifies 419 river reaches and 820 lakes in Minnesota as impaired because the fish in them are contaminated with mercury. While much has been done in Minnesota and nationally to reduce mercury emissions, coal-burning power plants remain a major contributor to mercury contamination of the environment.” A68. The bulk of mercury emissions from coal-fired power plants in Minnesota come from 6 units: Sherco 1, Sherco 2, Sherco 3, Boswell 3, Boswell 4 and Allen S. King. *See* PUC A11 (MPCA Graph); PUC A13 (Sen. Dibble statement).

**II. THE ACT REQUIRES RAPID AND SUBSTANTIAL REDUCTIONS IN MERCURY EMISSIONS FROM THE LARGEST COAL-FIRED EMITTERS, INCLUDING SHERCO 3.**

To help reduce the serious threats posed by mercury, the Legislature passed and the Governor signed the 2006 Mercury Emissions Reduction Act. In discussing the Act on the Senate Floor, Sen. Dibble explained that:

The Mercury Emissions Reductions Act of 2006 is a great leap forward for cleaning up our environment and addressing the threat of mercury that we have in Minnesota.

*See* PUC A13 (May 4, 2006 Floor Session). The Act was passed by a unanimous vote in both the House and the Senate. *See* PUC A15.

This nation-leading Act requires significant reductions in mercury emissions from the targeted coal-fired units ahead of those expected under federal law. Minn. Stat. § 216B.682; A162-3. The Act requires a public utility that owns a targeted unit to submit

a mercury reduction plan to the Commission<sup>1</sup> and MPCA for review. Minn. Stat. § 216B.682. The plan must propose to use the available technology that is likely to “result in the removal of at least 90 percent of the mercury emitted from the *unit*.” *Id.* (emphasis added).

The Legislature was clear that the Act applies to Sherco 3 and seeks to achieve a 90 percent reduction in mercury emissions from the Sherco 3 unit. The bill summary for the House bill that became the Act prepared by the non-partisan House Research Office provides that Sherco 3 is a “dry scrubbed unit” subject to the Act. A210. The bill summary further states that the Act requires a mercury reduction plan for Sherco 3 that uses the technology that is most likely to remove at least 90 percent of mercury emitted from the “unit.” A210. Similarly, Sen. Dibble stated that the Act covers the “Xcel Sherco plant up in Sherburne County, all three boilers up there; . . . The Bill asks that we use technology that’s most likely to achieve the 90% reduction in mercury emissions.” PUC A13; *see also* PUC A12 (March 28, 2006 Statement of Bob Eleff, Legislative Analyst, regarding an earlier version of the bill that became the Act; stating “Section 4 of the bill contains the definitions, the most prominent of which I guess relate to exactly

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<sup>1</sup> The MPUC’s authority is much broader than SMMPA implies in its Statement of the Facts. SMMPA Br. at 4. The MPUC’s statutory authority extends well beyond regulating the rates and service of public utilities. *See generally* ch. 216B, 216E. The MPUC’s authority includes, among others, authorizing construction of new large energy facilities, siting of new large energy facilities, overseeing implementation of the renewable energy standards by electric utilities, adopting a state transmission list, and approving mercury reduction plans. *See* Minn. Stat. §§ 216B.243 (2008), 216E.03 (2008), 216B.1691 (2008), 216B.2425 (2008), 216B.68-.688 (2008).

which coal-fired power plants are covered by this Bill, and those include Sherco 1, 2 and 3, and Clay Boswell units 3 and 4, and the A.S. King plant as well.”).

SMMPA itself has recognized that the Act applies to Sherco 3 as a whole. In its 2006 annual report, SMMPA states:

In passing the Mercury Reduction Act of 2006, the Minnesota Legislature went beyond federal emission regulations. Sherco 3, [sic] must reduce mercury emissions by 90 percent by the end of 2010.

PUC A23.

**III. THE MERCURY EMISSIONS REDUCTION PLAN FOR SHERCO 3 WAS FILED WITH THE COMMISSION AND MPCA FOR REVIEW.**

On December 21, 2007, Xcel filed a mercury emissions reduction plan for the Sherco 3 unit. A1, A3. Sherco 3 is a significant source of mercury emissions in the State. From 2003-2006, Sherco 3 emitted on average 410 pounds of mercury per year. A68.

Xcel’s proposed plan included information on the mercury emissions control costs. The information provided by Xcel showed that the technology it proposed to use was “both lower cost and more cost-effective overall.” A37. The next best option was nearly three times as expensive. A37. Xcel also projected that the average rate impact for its residential customers in 2010 would be ten cents per month, assuming no cost sharing between Xcel and SMMPA. A33.

**IV. THE MPCA REVIEWED THE PLAN AND RECOMMENDED APPROVAL.**

Consistent with the Act, the MPCA reviewed the mercury reduction plan for Sherco 3. Minn. Stat. § 216B.684. On June 18, 2008, the MPCA filed its report with the Commission recommending approval of the plan. A58, A75. The MPCA found that

Xcel's plan for Sherco 3 would: i) result in substantial mercury reductions; ii) provide environmental and public health benefits; and iii) use the least-cost method that is most likely to achieve a 90 percent reduction in mercury emissions. A58-73. The MPCA determined that the plan "represents a low-cost means of achieving" mercury reductions. A73. Significantly, the MPCA concluded that the plan "will likely meet, and potentially exceed, the Mercury Emissions Reduction Act's goal of a 90 percent reduction of mercury from Sherco 3." A73.

**V. CONSISTENT WITH THE ACT, THE COMMISSION REVIEWED AND APPROVED THE MERCURY REDUCTION PLAN FOR SHERCO 3.**

After receiving the MPCA's report and recommendation, the Act requires the Commission to make a determination on the plan within 180 days. Minn. Stat. § 216B.685. To assist in its evaluation of the proposed plan within the limited time frame, the Commission solicited comments from interested persons. A74.

The Minnesota Office of Energy Security filed comments recommending approval of the plan. A75-78. The Izaak Walton League did so as well. A85-86.

SMMPA filed comments with the Commission stating that SMMPA and Xcel had discussed issues associated with the plan but had not reached agreement on certain issues including how to allocate costs. A102. SMMPA requested that the Commission delay taking action on the plan until after SMMPA and Xcel reached agreement on these issues. A102. In the alternative, SMMPA requested that the Commission require Xcel to bear 100 percent of the costs even though SMMPA is a co-owner of the unit and gets virtually all of its power from this generating unit. A102-03. SMMPA argued that the Act does

not apply to SMMPA's interest in Sherco 3. A104-105. SMMPA also made arguments regarding the cost analysis. A106.

At the MPUC hearing on the matter, SMMPA expressed concern about the amount its customers might have to pay for the mercury reductions at Sherco 3 if SMMPA is responsible for 41 percent of the costs, an amount corresponding to its ownership interest. SMMPA alleged that its average residential customer would pay approximately \$2.73 per month. A147. SMMPA suggested that this would be unfair as compared to the average Xcel residential customer. A147.

However, SMMPA failed to note a fundamental difference between SMMPA customers and Xcel customers: SMMPA's customers get virtually all of their power from Sherco 3, whereas Xcel's customers get their power from numerous different facilities. *See* A147 (SMMPA representative stating that SMMPA receives 95 percent of its power from Sherco 3); PUC A11 (showing some, but not all, of the Xcel's electric generating facilities). As a result, any amount the average Xcel residential customer pays for the cost of the Sherco 3 mercury reduction plan will be in addition to emissions reduction costs at other facilities. For example, Xcel's average residential customer already pays an estimated \$2.63 per month to cover the costs of the Metropolitan Emissions Reduction Project ("MERP"), an emissions reduction plan implemented by Xcel at other facilities.<sup>2</sup>

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<sup>2</sup> The \$2.63 estimate of the current residential MERP rider amount is calculated by taking the 2008 average residential monthly MERP rider amount of \$2.18, as estimated by the Minnesota Department of Commerce, and then increasing that amount proportionately to reflect the increase in the per kilowatt hour residential rate from \$.00291 per kilowatt hour in 2008 to \$.0035 per kilowatt hour in 2009. *See* PUC A24, PUC A31 (MPUC Order, Docket No. E-002/M-02-633 (February 15, 2008) at 6 (incorporating and

Xcel's residential customers will also very likely incur costs associated with mercury reductions at Sherco 1 and 2 and the Allen S. King facility. *See* Minn. Stat. § 216B.682, Subd. 2; A210.

Further, Xcel's counsel stated at the Commission hearing that the issue of allocation of costs between Xcel and SMMPA for the mercury reduction plan is governed by the companies' ownership agreement. A157-58. If the two companies have a dispute about costs, they can resolve that dispute according to the agreement. A158.

After considering oral and written comments from parties and interested persons, the Commission issued its *Order*. In its *Order*, the Commission determined that the Act applies to the Sherco 3 unit. ADD. 4. The Commission also found that the issue of cost sharing between Xcel and SMMPA is not an extraordinary circumstance that would justify a delay of implementation of the mercury reductions that the Legislature ordered be implemented on a rapid basis at Sherco 3. ADD. 4. The Commission noted that the cost allocation issue need not be decided in order to approve the plan. The Commission also determined that "the proposed plan filed by Xcel meets the requirements of the statute, promises significant environmental and health benefits, is technically feasible, is

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attaching the recommendations of the Department of Commerce)), also available at <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={569BFA29-C950-4C8B-B27B-1D5BA179AF49}&documentTitle=4945354>; PUC A35 (Xcel Energy Errata, 2009 MERP Revenue Requirements and Tracker Report, Attachment 8, MPUC Docket No. E-002/M-02-633 (filed October 17, 2008) (showing a 2009 Residential MERP rider rate of \$.0035/kWh and a 2008 Residential MERP rider rate of \$.00291/kWh), also available at <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={19903CAC-22BF-45E1-8439-8914B16F7B12}&documentTitle=5571067>.

cost-effective and will not impose excessive costs on Xcel's customers." ADD. 5; *see also* A188. (Comm. Reha noting benefits to SMMPA's customers as well).

### SCOPE OF REVIEW

Minn. Stat. § 14.69 (2008) outlines the scope of judicial review of an agency decision. This statute provides that an agency's decision will be affirmed unless the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

On appeal, agency decisions enjoy a presumption of correctness and "deference should therefore be shown by courts to the agency's expertise and its special knowledge in the field." *In re Application Grand Rapids Pub. Utilities Comm'n To Extend Its Assigned Service Area*, 731 N.W.2d 866, 870 (Minn. Ct. App. 2007) (citations omitted). The party seeking review bears the burden of proving that the agency's conclusions violate one or more provisions of Minn. Stat. § 14.69. *Markwardt v. State, Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

A decision may be deemed "arbitrary and capricious" if the decision reflects the agency's will and not its judgment. *See Trout Unlimited, Inc. v. Minnesota Dep't of Agric.*, 528 N.W.2d 903, 907 (Minn. Ct. App. 1995) (citations omitted). The agency satisfies the arbitrary and capricious test where the agency considers "the issues, ma[kes] judgments on the arguments raised by the parties, and explain[s] its reasoning. . . ." *See*

*In re Petition of Minnesota Power for Authority to Change its Schedule of Rates for Retail Electric Service*, 545 N.W.2d 49, 51 (Minn. Ct. App. 1996). “Where there is room for two opinions on the matter, such action is not ‘arbitrary and capricious,’ even though it may be believed that an erroneous conclusion has been reached.” *Id.* (citations omitted).

Courts give substantial deference to the agency’s fact-finding process and it is the challenger’s burden to establish that the findings are not supported by the evidence. *See In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d 264, 279 (Minn. 2001) (citation omitted). A reviewing court may not substitute its own judgment for that of an administrative agency when the agency’s finding is properly supported by the evidence. *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

This court reviews questions of law de novo. *In re Denial of Eller Media Co.’s Application for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003). Nonetheless, “an agency’s interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature.” *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (citations omitted); *see also Frieler v. Carlson Marketing Group*, 751 N.W.2d 558, 567 (Minn. 2008) (quoting *Hormel*).

## SUMMARY OF THE ARGUMENT

The Commission acted well within its statutory authority when it approved the mercury reduction plan for Sherco 3. The Act expressly authorizes the Commission to review and approve a mercury reduction plan for the Sherco 3 unit filed by Xcel. Minn. Stat. §§ 216B.68, 216B.682, 216B.685. The plain language of the Act demonstrates that the Act applies to the entire Sherco 3 unit, not just Xcel's 59% ownership interest in Sherco 3 as erroneously argued by SMMPA on appeal. Minn. Stat. §§ 216B.682, 216B.685. The legislative history confirms that the Act covers the entire Sherco 3 unit. Further, the Commission's approval of the plan is fully consistent with Minn. Stat. § 216B.01. To the extent the approval of the plan regulates SMMPA's interest and SMMPA, the Legislature has "specifically provided" that authority to the Commission. Therefore, the Commission's decision to approve the Sherco 3 mercury reduction plan is fully authorized by the Legislature and is necessary to fulfill the requirements of the Act.

In addition, the Commission's decision is well-reasoned, not arbitrary and capricious. Contrary to SMMPA's assertion, the Act does not require consideration of the allocation of costs between Xcel and SMMPA. Nor does the Act require consideration of a rate rider proposal from Xcel before the Commission can make its determination. The record shows that the mercury reduction plan is the least cost alternative and will not result in excessive costs to the utility's ratepayers. The Commission's decision is fully supported by the record, based on an analysis of each of the factors set forth in the Act, and reflects the Commission's reasoned judgment.

## ARGUMENT

### **I. THE COMMISSION HAS THE STATUTORY AUTHORITY TO APPROVE THE MERCURY REDUCTION PLAN FOR SHERCO 3, SUBMITTED BY XCEL.**

#### **A. The Plain Language Of The Act Authorizes The Commission To Approve A Mercury Reduction Plan For The Sherco 3 Unit.**

This case revolves around whether the Act authorizes the Commission to approve a mercury reduction plan for Sherco 3 as a whole or only for Xcel's 59% ownership interest. "The touchstone for statutory interpretation is the plain meaning of a statute's language." *ILHC v. Eagan, LLC*, 693 N.W.2d 412, 419 (Minn. 2005) (citing Minn. Stat. § 645.16). When the words of a statute are clear in their application to a particular case, the plain meaning of the law must not be disregarded. *Id.*; Minn. Stat. § 645.16.

Here, the plain language of the Act specifically authorizes the Commission to approve a mercury reduction plan for the entire Sherco 3 unit, not just for Xcel's 59% ownership interest as SMMPA erroneously argues. Section 216B.685 of the Act and Section 216B.682, which is incorporated by reference into Section 216B.685, provide this express authority to the Commission. *See ILHC*, 693 N.W.2d at 419 ("Our rules of statutory construction also require us to read a particular provision in context with other provisions in the same statute in order to determine the meaning of the particular provision."); *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000).

Section 216B.685 of the Act explicitly authorizes the Commission to review and approve mercury reduction plans for targeted coal-fired units. Subdivision 1 of Section 216B.685 provides:

The Public Utilities Commission *shall review and evaluate a utility's mercury emissions-reduction plans* and associated emissions-reduction riders submitted under section 216B.682 or pursuant to subdivision 2, paragraph (b). ...

(emphasis added). Further, Subdivision 2(a) provides that the Commission:

*“shall order the implementation of a utility’s mercury emissions-reduction plan ... that complies with the requirements of the applicable subdivision of section 216B.682, unless the commission determines that the plan as proposed fails to provide for increased environmental and health benefits or would impose excessive costs on the utility's customers.”*

(emphasis added). If the Commission is unable to approve the plan, the Commission must require the utility to either file an amended plan or a new plan. Minn. Stat. § 216B.685, Subd. 2(b). In conducting its review and evaluation, the Act directs the Commission to determine if the “plan” complies with the requirements of section 216B.682. Minn. Stat. § 216B.685, Subd. 2(a).

Section 216B.682, in turn, defines the scope of the plan to be filed with the Commission for review and approval. *See* Minn. Stat. §§216B.682, 216B.685. Subdivision 1 of Section 216B.682 requires the filing of a “plan for mercury emissions reduction at each [dry scrubbed] unit.” Minn. Stat. §§ 216B.682, Subd. 1(a) (the term “unit” in this provision clearly refers back to the term “dry scrubbed unit”). Further, Section 216B.682 specifies that “[a]t each dry scrubbed unit . . . , the plan must propose to employ the available technology for mercury removal that is most likely to result in *the removal of at least 90 percent of the mercury emitted from the unit.*” Minn. Stat. § 216B.682, Subd. 1(a) (emphasis added).

The plain language of Subdivision 1 of Section 216B.682 specifies that this provision applies to “dry scrubbed units.” A “dry scrubbed unit” is defined as a “targeted unit,” or coal-fired electric generation unit greater than 100 megawatts at a qualifying facility, “that uses a spray dryer and fabric filter system to remove pollutants from air emissions” installed by December 31, 2007. Minn. Stat. §216B.68, Subds. 3, 8. A “qualifying facility” in turn is defined as “an electric generating power plant in Minnesota that, as of January 1, 2006, had a total net dependable capacity in excess of 500 megawatts from all coal-fired electric generating units at the power plant.” Minn. Stat. § 216B.68, Subd. 6.

Because Sherco 3 is a 900 megawatt coal-fired electric generating unit at a qualifying facility, which uses a dry scrubbing system to control emissions, it is a “dry scrubbed unit” subject to Section 216B.682. *See* Minn. Stat. § 216B.68, Subds. 3, 6, 8; A210; A8; A14. SMMPA does not dispute that Sherco 3 is a “dry scrubbed unit” subject to this provision.

Xcel’s 59% ownership interest, on the other hand, is not a “dry scrubbed unit” within the meaning of Section 216B.682 because Xcel’s 59% ownership interest does not operate as its own coal-fired electric generation unit. *See* A14; SMMPA Br. at 4. This interpretation is consistent with the dictionary definition of “unit” as “a single quantity regarded as a whole in calculation.” *See* <http://www.merriam-webster.com/dictionary/unit>; *see also* *ILHC*, 693 N.W.2d at 419 (words are to be construed according to their most natural and obvious usage). Thus, because the plain language of Section 216B.682 expressly requires a mercury

reduction plan for each “dry scrubbed unit,” the Act is clear that the mercury reduction plan for Sherco 3 submitted for Commission review and approval must cover Sherco 3 as a whole, not just Xcel’s 59% ownership interest. Minn. Stat. §§ 216B.682, 216B.685.

This conclusion is buttressed by the requirement in Section 216B.682 that the plan for each “dry scrubbed unit”:

propose to employ the available technology for mercury removal that is most likely to result *in the removal of at least 90 percent of the mercury emitted from the unit.*

Minn. Stat. § 216B.682, Subd. 1(a) (emphasis added). The only way to achieve the Act’s express goal of eliminating “at least 90 percent of the mercury emitted from the unit” is if the mercury emissions reduction plan covers the entire Sherco 3 unit. If the Act only applied to Xcel’s 59% interest, it would be impossible to have a plan that is likely to result in the “removal of at least 90 percent of the mercury emitted from the [dry scrubbed] unit” as required by Minn. Stat. § 216B.682. Therefore, the plain language of the Act expressly applies to Sherco 3 as a whole, not just Xcel’s 59% ownership interest as argued by SMMPA. *See* Minn. Stat. § 645.16 (2008).

SMMPA’s focus on the term “public utility” in Section 216B.682 to argue the Act is limited to “that portion of Sherco 3 that is owned by Xcel” is misplaced and erroneous. SMMPA Br. at 18. Subdivision 1 of Section 216B.682 provides in pertinent part:

By December 31, 2007, a public utility that owns a dry scrubbed unit at a qualifying facility shall develop and submit to the agency and the commission a plan for mercury emissions reduction at each such unit. At

each dry scrubbed unit owned and operated by the utility, the plan must propose to employ the available technology for mercury removal that is most likely to result in the removal of at least 90 percent of the mercury emitted from the unit.

The plain language quoted above shows that the term “public utility” *only* defines which entity is required to file the mercury reduction plan. Minn. Stat. §216B.682, Subd. 1(a) (“[A] public utility that owns . . . shall develop and submit to the agency and the commission a plan. . . .”) Here there is no dispute that Xcel is the “public utility” subject to this provision.

The rest of the provision, which SMMPA ignores in its brief, defines the scope of the plan and the Commission’s authority over the plan. As discussed above, this language expressly requires that the plan cover mercury emissions reductions from Sherco 3 as a whole, not just Xcel’s 59% interest. Minn. Stat. §216B.682. Further, the Act expressly authorizes the Commission to approve such a plan. Minn. Stat. §216B.685. If the Legislature had intended the mercury emissions reduction plan to be limited to Xcel’s ownership interest in the unit, it would have said so expressly but it did not. *See Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006) (noting that the court “will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently.”)<sup>3</sup> Therefore, the

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<sup>3</sup> SMMPA also erroneously suggests that the Act is limited to public utilities because only public utilities will benefit from the financial incentives in the Act. This claim is without merit. It would not have made sense for the Legislature to have extended the financial incentives to municipal utilities because the owners and customers of municipal utilities are one in the same. Thus, the existence of a financial incentive for public utilities in no way evidences an intent by the Legislature to exempt part of Sherco 3 from the Act.

Act explicitly authorizes the Commission to review and approve a plan filed by Xcel for Sherco 3 as a whole. Minn. Stat. §§ 216B.685, 216B.682; *see also ILHC*, 693 N.W.2d at 419 (“When a statute’s meaning is plain from its language as applied to the facts of the particular case, a judicial construction is not necessary.”)

**B. The Legislature Need Not Include The Term “Municipal Utility” In The Act To Give The Commission Authority To Approve A Mercury Emissions Reduction Plan For Sherco 3 As A Whole.**

SMMPA argues that the Commission is not authorized to approve the plan for Sherco 3 because the Act does not refer to municipal utilities. This argument is wrong. It is based on an erroneous interpretation of Section 216B.01 (2008) and the *Hutchinson* case, and ignores the plain language of the Act.

Contrary to SMMPA’s assertion, Section 216B.01 does not require the Legislature to use the term “municipal utility” in the Act in order to give the Commission the authority to approve a mercury reduction plan for a coal-fired generating unit that is co-owned by a public utility and a municipal utility. Instead, Section 216B.01 provides:

Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them, and cooperative electric associations are presently effectively regulated and controlled by the membership under the provisions of chapter 308A, it is deemed unnecessary to subject such utilities to regulation under this chapter *except as specifically provided herein*.

(emphasis added). Thus, the question is whether Sections 216B.68-.688 (the Act) “specifically provide[]” for any regulation of SMMPA arising from the *Order*, not whether the Act uses the term “municipal utility” or other similar terms.

SMMPA argues that by approving the mercury reduction plan for Sherco 3, the Commission has regulated SMMPA's interest in Sherco 3 and SMMPA. To the extent the Commission's approval of the mercury reduction plan for Sherco 3 subjects SMMPA's interest in Sherco 3 and SMMPA to Commission regulation, the Legislature has "specifically provided" for that regulation of SMMPA. As discussed in the preceding section, the Act expressly provides the Commission with authority to approve a mercury reduction plan for Sherco 3 as a whole. Minn. Stat. §§ 216B.682, 216B.685; *see supra* at 13-17.

There was no need for the Legislature to include the term "municipal utility" in the Act to subject all of Sherco 3 to its provisions. By requiring a mercury reduction plan for each "dry scrubbed unit" with the goal of "removal of at least 90 percent of the mercury emitted from the unit," the Legislature expressly subjected all of Sherco 3, including SMMPA's interest, to the Commission's jurisdiction. Minn. Stat. §§ 216B.682, 216B.685; *see supra* at 15-16.

Finally, SMMPA's reliance on the *Hutchinson* decision is misplaced. The *Hutchinson* case is distinguishable from the case at hand for two reasons. First, the *Hutchinson* case involved interpretation of Minn. Stat. § 216B.045, not Minn. Stat. §§ 216B.68-685, which are at issue here. *In the Matter of an Investigation into the Commission's Jurisdiction over the City of Hutchinson's Interstate Natural Gas Pipeline*, 707 N.W.2d 223, 226 (Minn. Ct. App. 2005). As discussed above, the express language of Sections 216B.685 and 216B.682 specifically authorizes the Commission to approve a plan for the entire Sherco 3 unit even though the term "municipal utility" is not included.

*See supra* at 13-17. The *Hutchinson* decision cannot be interpreted to allow this Court to override the plain language of the Act and the Legislature's clear intent. *See* Minn. Stat. § 645.16; *ILHC*, 693 N.W.2d at 419 ("The touchstone of statutory interpretation is the plain meaning of a statute's language.") Yet, that is what SMMPA is asking that this Court do.

Second, this case is distinguishable from *Hutchinson* because *Hutchinson* involved a facility that was owned solely by a municipal utility, whereas here the facility in question is co-owned by a public utility and a municipal utility. *See Hutchinson*, 707 N.W.2d at 224-25. While the Court in *Hutchinson* found that Minn. Stat. § 216B.045 did not apply to the pipeline owned solely by the municipal utility because that statute did not specifically provide for regulation of municipal utilities, the Court did not address a situation where the facility is owned by both a municipal utility and a public utility. *Id.* at 227. Where as here, the facility is co-owned by a municipal utility and public utility, it is not necessary to specifically include the phrase "municipal utility" to subject the entire facility to regulation. By requiring a mercury reduction plan for each "dry scrubbed unit" that "is most likely to result in the removal of at least 90 percent of the mercury emitted from the unit," the Act specifically covers Sherco 3 as a whole. Minn. Stat. § 216B.682. Further, the Act expressly authorizes the Commission to approve such a plan for the Sherco 3 unit. Minn. Stat. § 216B.685. Therefore, *Hutchinson* is distinguishable from the case at hand. The Commission acted fully within its jurisdiction when it issued its *Order* approving the mercury reduction plan for the Sherco 3 unit.

**C. The Legislative History Confirms That The Commission Has The Authority To Approve A Mercury Emissions Reduction Plan For Sherco 3 As A Whole.**

As discussed above, the plain language of the Act expressly authorizes the Commission to approve the mercury reduction plan for Sherco 3, submitted by Xcel. Thus, there is no need for the Court to look any further to interpret the Act. *See* Minn. Stat. § 645.16.

However, to the extent this Court disagrees and believes there is some ambiguity as to extent of the Commission's authority under the Act, the legislative history resolves any doubt. *See Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000) ("If the language of a statute is ambiguous, courts then turn to the statute's legislative history to determine how the language should be construed."); Minn. Stat. § 645.16. The Legislature was clear that the Act applies to Sherco 3 as a whole, not just Xcel's 59% interest as SMMPA erroneously argues.

The Legislature enacted the Mercury Emissions Reduction Act of 2006 to help reduce the extremely serious health risks posed by mercury emissions. As Sen. Dibble, the Senate author, noted:

Mercury . . . is an extremely potent neurotoxin. It affects our liver and kidney function, it . . . affects our nervous system, and . . . our brain function. It's particularly insidious in it's effects on . . . young children and fetuses that are developing inside their moms. . . .

PUC A13 (Sen. Dibble Floor Statement, May 2, 2006); *see also* A70.

The Legislature recognized that coal-fired electric plants are a major source of mercury emissions in the State. To help reduce the health risks arising from these

emissions, the Legislature targeted emission reductions from the largest coal-fired emitters: namely, Sherco 1, 2, and 3, Allen S. King, and Boswell 3 and 4. PUC A13(Sen. Dibble Floor Statement, May 2, 2006); A210 (House Research Bill Summary)); PUC A11 (Graph provided by the MPCA at the March 24, 2006 Senate, Jobs, Energy and Community Development Committee meeting). In fact, MPCA information shows that Sherco 3 was estimated to be the largest emitter of mercury of all the coal-fired electric units in the State. PUC A11.

The Legislature was clear that the Act applies to Sherco 3 as a whole. The bill summary for the House version of the Act prepared by the non-partisan House Research Office provides that Sherco 3 is a “dry scrubbed unit” subject to the Act, and the Act requires a mercury reduction plan using the technology that is most likely to remove at least 90 percent of the mercury emitted from each such dry scrubbed unit. A210. Similarly, Sen. Dibble, the Senate author of the Act, stated that the Act covers the “Xcel Sherco plant up in Sherburne County, all three boilers up there; . . . . The Bill asks that we use technology that’s most likely to achieve the 90% reduction in mercury emissions.” PUC A13; *see also* PUC A12. Thus, the Legislature fully intended the Act to apply to Sherco 3 as a whole.

This conclusion is confirmed by Sen. Dibble’s statement on the Senate Floor that the Act would eliminate about 1200 pounds of mercury emissions through a 90 percent reduction of mercury emissions at six coal-fired units (Sherco 1, 2, 3, Allen S. King,

Boswell 3 and 4). PUC A13-A14.<sup>4</sup> As the MPCA graph shows, it is only possible to achieve the 1200 pounds in reductions from the six targeted units if Sherco 3 as a whole is subject to the Act, not just Xcel's 59% ownership interest. The MPCA graph shows the following estimated amount of mercury emissions from the six units subject to the Act:

Unit	MPCA Estimated Mercury Emissions In 2009 (In Approximate Pounds)
Sherco 3 <sup>5</sup>	400
Sherco 1	314
Sherco 2	292
Allen S. King	71
Boswell 3	100
Boswell 4	164
Total	1341

See PUC A11.

According to the MPCA graph, these six units were estimated to emit about 1341 pounds of mercury *before* the reductions required by the Act. A ninety percent

<sup>4</sup> Sen. Dibble's reference to a 70 percent reduction in relation to the 1200 pounds does not refer to the amount to be reduced at each plant. Rather, the 70 percent reduction is a comparison of the 1200 pounds eliminated under the Act to the total mercury emissions from all coal-fired units in the state, including the numerous small emitters that are not subject to the Act. See PUC A11, A5, A13, (MPCA graph showing emissions from all coal-fired plants; note this graph reflects estimated emissions amounts after the MERP and certain voluntary reductions by Minnesota Power. Senator Dibble's later statements specify that the 1200 pounds in mercury emissions reductions will come from a 90 percent reduction of emissions at each of the six units subject to the Act.)

<sup>5</sup> The estimated amount of emissions is for all of Sherco 3. See PUC A11; A68.

reduction of the estimated 1341 pounds of mercury emitted by these six units equals 1207 pounds, or approximately 1200 pounds. The very amount that Sen. Dibble said the Act would eliminate. If not all of Sherco 3's mercury emissions are subject to the Act but only those attributable to Xcel's 59% interest in Sherco 3 as SMMPA argues, then the mercury emissions subject to the Act would be reduced by 164 pounds<sup>6</sup> and the total mercury emissions subject to the Act *before* any reductions would be only approximately 1177 pounds. A ninety percent reduction of the 1177 pounds of mercury emissions would result in only 1059 pounds of mercury emissions reductions, far less than Sen. Dibble said the Act would achieve. Thus, SMMPA's claim that the Act applies only to Xcel's 59% interest is refuted by the legislative history. *See Am. Family Ins.*, 616 N.W.2d at 278 (stating the goal of statutory interpretation is to ascertain and effectuate the intent of the Legislature).

Given that the MPCA estimated Sherco 3 to be the largest mercury emitter of all the coal-fired electric units in the State, it is logical that the Legislature would apply the Act to Sherco 3 as a whole. The Legislature's overriding concern in passing the Act was to reduce the harmful health and environmental effects caused by mercury emissions. The mercury emissions that SMMPA attributes to its ownership interest are no less harmful to human health and the environment than the emissions from Xcel's portion. Applying the Act only to Xcel's 59% ownership interest would thwart the Legislature's clear intent of achieving a 90 percent reduction of mercury emissions from the Sherco 3

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<sup>6</sup> The mercury emissions subject to the Act would be reduced by 164 pounds because that amount equals SMMPA's 41 percent share of the 400 pounds of mercury emissions from the Sherco 3 unit, as estimated by the MPCA.

unit. A210. Thus, the legislative history demonstrates that the Act applies to Sherco 3 as whole. *See Am. Family Ins.*, 616 N.W.2d at 278; *Baker*, 616 N.W.2d at 269.

Indeed, SMMPA itself has admitted that the Act applies to Sherco 3 as a whole. In its 2006 annual report, SMMPA states:

In passing the Mercury Reduction Act of 2006, the Minnesota Legislature went beyond federal emission regulations. Sherco 3, [sic] must reduce mercury emissions by 90 percent by the end of 2010.

PUC A23. SMMPA would not have included this statement in its annual report if the Act did not apply to the entire Sherco 3 unit, including SMMPA's interest.

**D. The Commission Acted Well Within Its Statutory Authority When It Approved The Mercury Reduction Plan For Sherco 3.**

As shown above, the plain language of the Act requires Xcel to submit a mercury reduction plan to the Commission covering Sherco 3 as a whole, not just Xcel's 59% ownership interest. Minn. Stat. § 216B.682 (requiring a plan for the "dry scrubbed unit" that is most likely to remove at least 90 percent of the mercury emissions from the "unit"). The Act also expressly authorizes the Commission to review and approve such a plan. Minn. Stat. § 216B.685. The legislative history and SMMPA's own 2006 Annual Report confirm that the Act extends to Sherco 3 as a whole, not just Xcel's 59% ownership interest. Therefore, the Commission acted fully within its statutory authority when it approved Xcel's mercury reduction plan for Sherco 3, which seeks to reduce harmful mercury emissions from the unit by 90 percent. *See In re Petition of Minnesota Power for Authority to Change its Schedule of Rates for Retail Electric Service*, 545 N.W.2d 49, 51-52 (Minn. Ct. App. 1996) (affirming the

Commission's order where the Court determined the Commission had the statutory authority to delay implementation of approved rates). Indeed, the Commission's approval of the mercury reduction plan for Sherco 3 is not only authorized by the Act but is required to uphold the Legislature's intent. *Am. Family Ins.*, 616 N.W.2d at 278 (stating that the object of statutory interpretation is to effectuate the intent of the legislature).

**II. THE COMMISSION'S DECISION TO APPROVE THE MERCURY REDUCTION PLAN FOR SHERCO 3 IS WELL-REASONED, NOT ARBITRARY AND CAPRICIOUS.**

This Court should also reject SMMPA's mistaken argument that the Commission's decision is arbitrary. The Commission's decision to approve the mercury reduction plan for Sherco 3 reflects the Commission's reasoned judgment. The decision is based on the Commission's consideration of all of the factors set forth in the Act and is fully supported by the record. Contrary to SMMPA's assertion, the Act does not require consideration of cost allocation issues or a rate rider proposal before the Commission can determine whether the plan should be approved.

The Act defines the issues the Commission is to consider in deciding whether to approve a mercury reduction plan. Section 216B.685 provides in relevant part:

**Subdivision 1. Commission review and evaluation.** The Public Utilities Commission shall review and evaluate a utility's mercury emissions-reduction plans and associated emissions-reduction riders submitted under section 216B.682 or pursuant to subdivision 2, paragraph (b). In its review, the commission shall consider the environmental and public health benefits, the agency's assessment of technical feasibility, competitiveness of customer rates, and cost-effectiveness of the utility's proposed mercury-control initiatives in light of the Pollution Control Agency's report under section 216B.684.

**Subd. 2. Commission approval.**

(a) Within 180 days of receiving the agency's report on a utility's plan filed under section 216B.682, subdivision 1 or 2, the commission shall order the implementation of a utility's mercury emissions-reduction plan and associated emissions-reduction rider that complies with the requirements of the applicable subdivision of section 216B.682, unless the commission determines that the plan as proposed fails to provide for increased environmental and health benefits or would impose excessive costs on the utility's customers.

The Commission considered each of the factors set forth in Section 216B.685 listed above. *See* ADD. 1-5 (*Order*). The Commission specifically found “the record demonstrates that the proposed plan filed by Xcel meets the requirements of the statute, promises significant environmental and health benefits, is technically feasible, is cost-effective, and will not impose excessive costs on Xcel’s customers.” ADD. 5.

SMMPA argues that the Commission failed to adequately consider the costs of the mercury reduction plan on ratepayers because i) the Commission did not address allocation of the costs of the plan between Xcel and SMMPA, and ii) Xcel did not file a rate rider along with its plan. Both claims fail upon examination.

First, the Commission properly declined to address the issue of allocation of mercury reduction costs between Xcel and SMMPA. The cost allocation issue is governed by the ownership agreement between Xcel and SMMPA. A157-58. The allocation of costs between the two companies is not governed by the Act. The Legislature specifically limited the Commission’s review of rate impacts to impacts on the public “utility’s” customers (here Xcel’s customers) and left the issue of cost allocation to Xcel and SMMPA to resolve. *See* Minn. Stat. § 216B.685, Subd. 2

(requiring the Commission to order implementation of “a *utility’s* mercury emissions-reduction plan. . . . unless the [C]ommission determines that the plan as proposed fails to provide for increased environmental and health benefits or would impose excessive costs on the *utility’s* customers”); *see also* Minn. Stat. § 216B.682. If the Legislature had intended the Commission to consider the issue of allocation of costs between Xcel and SMMPA or the cost impacts to SMMPA’s customers, it would have expressly so provided but it did not. *See Reiter*, 721 N.W.2d at 911 (stating that the court “will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently”); *see also*, *Geo. A. Hormel*, 428 N.W.2d at 50 (courts should defer to an agency’s interpretation of a statute it administers where it is consistent with the intent of the legislature and the express purpose of the Act).

Here, the Commission had sufficient information to determine that the plan would not impose excessive costs on Xcel’s customers even without resolution of the cost allocation issue. Xcel presented information in its filing showing that even if Xcel’s customers were to bear 100 percent of the cost of the plan (and SMMPA’s customers were to pay nothing), the average rate impact for an Xcel Minnesota residential customer in 2010 would be ten cents per month. A33. Further, Xcel presented information showing the mercury emissions reduction costs would not exceed \$4.651 million per year at the Sherco 3 unit. A33. The record also shows that Sherco 3 is a 900 megawatt plant. A14. This translates into a cost of about \$0.0007 or .07 cents per kilowatt hour of power

used from Sherco 3.<sup>7</sup> Based on this record information and the Commission's experience reviewing such data, the Commission properly determined that the plan would not "impose excessive costs on Xcel's customers" as required by Section 216B.685. *See In the Matter of Quantification of Environmental Costs*, 578 N.W.2d 794, 799 (Minn. Ct. App. 1998) (accorded substantial deference to the fact finding processes of an administrative agency); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (stating that courts show deference to an agency's expertise and special knowledge in the field of its technical training, education and experience).

SMMPA is raising its concerns about the costs to SMMPA and its customers in the wrong forum. SMMPA should have raised these concerns with the Legislature because it is the Legislature that defined the cost considerations under the Act.<sup>8</sup> The

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<sup>7</sup> The cost per kilowatt hour is calculated as follows: cost per year/total kilowatts generated per year. The total kilowatts generated per year is equal to the size of plant multiplied by the capacity factor multiplied by the hours in a year multiplied by the conversion from megawatts to kilowatts. Here, the calculation is  $\$4,651,000 / (900 \text{ MW} * .85 * (24 * 365) * 1000 \text{ kilowatts per megawatt})$ . The cost per year is found at A33, using the highest estimated cost per year. The 900 megawatt capacity is found at A14. The capacity factor is found at A29, n.2.

<sup>8</sup> In any event, even if SMMPA were to be responsible for 41% of the costs of the mercury reduction plan based on its 41% ownership interest, the amount the average SMMPA customer would pay per month is reasonable considering that SMMPA gets virtually all of its power from Sherco 3. According to SMMPA's representative, the average residential customer served by SMMPA would pay approximately \$2.73 per month for the elimination of hazardous mercury emissions. A147. This amount is similar to the estimated \$2.63 per month that the average Xcel residential customer *already* pays to cover the costs of the Metropolitan Emissions Reduction Project ("MERP"), an emissions reduction plan implemented by Xcel at other Xcel coal-fired units. *See supra* at 8-9. The MERP emissions reductions costs do not include costs of mercury emissions reductions at Sherco 1, 2, and 3 and the Allen S. King plant required by the Act. Those costs will be added on top of the estimated \$2.63 per month.

Legislature was also clear that the Act applies to Sherco 3 as a whole and is intended to achieve a 90 percent reduction of hazardous mercury emissions from that “unit.”

Second, contrary to SMMPA’s assertion, the filing of a rate rider by Xcel is not necessary to do the cost analysis set forth in the Act. The filing of a rate rider proposal is permissible, not mandatory, under the Act. The Act provides that “[a] public utility required to file a mercury emissions-reduction plan . . . may also file for approval of emissions-reduction rate riders pursuant to section 216B.1692 . . .” Minn. Stat. § 216B.683, Subd. 1(a). This language is unambiguous that the filing of a mercury reduction plan is “required” but the filing of a rate rider proposal is not. The utility “may” file a rate rider proposal. *Id.* Given that the filing of a rate rider proposal is discretionary, there is certainly no requirement that the Commission’s consideration of costs must include consideration of a rate rider as SMMPA erroneously claims.

Further, SMMPA also errs when it claims that the Commission did not have sufficient information to determine whether the plan would “impose excessive costs on the utility’s customers” because Xcel did not present the potential rate impact on each individual customer class. There is no need for an explicit break down for every customer class in order for the Commission to determine whether the plan will “impose excessive costs on the utility’s customers.” As the record in this case shows, the overall costs are so low that the Commission had sufficient information to reasonably conclude that the plan will not impose excessive costs on Xcel’s customers.

As discussed above, the record shows that the Sherco 3 mercury reduction plan will cost about \$0.0007 or .07 cents per kilowatt hour of power used from Sherco 3, an

extremely small amount. *See supra* at 28-29. Further, Xcel presented information showing that the average Xcel Minnesota residential customer would pay only about 10 cents per month for the plan even if Xcel's customers were responsible for all of the costs of the plan. A33. In addition, the MPCA determined that Xcel's mercury reduction plan for Sherco 3 uses the "least-cost" technology "that has the greatest potential of achieving the statutory goal of [a] 90 percent reduction of mercury emissions at Sherco Unit 3." A65; *see also* A73. Based on the Commission's extensive experience in evaluating costs and setting rates, the Commission reasonably concluded that the totality of the record information shows that the Sherco 3 mercury reduction plan will not "impose excessive costs on the utility's customers." *See In the Matter of Quantification of Environmental Costs*, 578 N.W.2d at 799 (Minn. Ct. App. 1998) (accordance with substantial deference to the fact finding process of the Commission); *Reserve Mining Co.*, 256 N.W.2d at 824 (stating that courts show deference to an agency's expertise and special knowledge).

The Commission's decision to approve this very cost-effective mercury reduction plan for Sherco 3 is based on an examination of the factors set forth in the statute, the record and its reasoned judgment. The Commission's decision is rational, not arbitrary, and should be affirmed. *See In re Petition of Minnesota Power for Authority to Change its Schedule of Rates for Retail Electric Service*, 545 N.W.2d at 51 (holding the Commission satisfied the arbitrary and capricious test where the agency considers "the issues, ma[kes] judgments on the arguments raised by the parties, and explain[s] its reasoning").

## CONCLUSION

The Commission acted well within its statutory authority when it issued its *Order* approving the mercury reduction plan for Sherco 3. The plain language of the Act unambiguously authorizes the Commission to review and approve the plan for Sherco 3. Further, the Commission's *Order* is fully supported by the record and well-reasoned. Based on the foregoing, the Commission respectfully requests the Court affirm the Commission's *Order*.

Dated: May 12, 2009

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